In the Supreme Court of the United States.

OCTOBER TERM, 1873.

OREGON STEAM NAVIGATION COMPANY,
Plaintiff in Error,
vs.
HENRY WISNOR, C. CROSBY, N. CROSBY, Jr.,
C. H. HALE, S. D. HOWE, and A. R. ELDER.
No. 222.

In Error to the Supreme Court of the Territory of Washington.

STATEMENT.

In the fall of 1869, suit was brought by the plaintiff in error against the defendants in error, in the district court of the second judicial district of Washington Territory, to recover the sum of $75,000 in coin, as stipulated damages, for breach of covenant.

The complaint set forth (*inter alia*) that in May, 1864, the California Steam Navigation Company, a corporation organized under the laws of California, and engaged in the transportation of freight and passengers on the waters of that State, sold to the plaintiff the steamer "New World" for the sum of $75,000 in coin, and for the further consideration of a certain covenant, whereby the plaintiff agreed not to run or employ the

said steamer, nor to suffer it to be run or employed, nor to use the machinery thereof in running any boat, "upon any of the routes of travel, or the rivers, bays, or waters of the State of California, for the period of ten years, from the first day of May, 1864," and, in case of any breach of the covenant, to pay to the said company the sum of $75,000 in coin "as actual liquidated damages;" that afterwards, to wit, on the 18th of February, 1867, plaintiff sold the said steamer to four of the defendants (H. Wisnor, C. Crosby, N. Crosby, jr., and C. H. Hale) for the sum of $75,000, payment of which is admitted, and for the further consideration of a certain covenant, then executed by them, and also by the two other defendants (S. D. Howe and A. R. Elder) as sureties, by which it was agreed that the said Wisnor, C. Crosby, N. Crosby, jr., and Hale, their successors and assigns, would "not run or employ, or suffer to be run or employed, the said steamboat 'New World' upon any of the routes of travel, or the rivers, bays, or waters of the State of California, or the Columbia river and its tributaries, for the period of ten years from the first day of May, 1867;" and furthermore, that the machinery thereof should not be run or employed in propelling any steamboat, vessel, or craft upon any of said waters during the same period; and in case of any breach of this covenant, it was also agreed to pay the plaintiff the sum of $75,000 in coin "as actual liquidated damages." (Record, pp. 4, 5, 6.)

The complaint further set forth that, at the time of the sale the plaintiff was engaged in navigating the waters of the Columbia river and its tributaries,

in the State of Oregon and the Territory of Washington; that the defendants, Wisnor, C. and N. Crosby, and Hale, were then engaged in the navigation of the waters of Puget Sound, in the Territory of Washington, and were in no wise engaged in navigating the waters of Oregon and Washington Territory, or the waters of California, described in their covenant with the plaintiff; and that the California Steam Navigation Company was then and afterwards, up to the commencement of the suit, engaged in the navigation of the said waters of the State of California.

The breach assigned was, that after the making of said covenant, and within ten years from the 1st of May, 1867, to wit, on the 1st of November, 1868, and from that time up to the commencement of the suit, said steamer was employed in the transportation of passengers and freight between San Francisco and Vallejo, in California, on the waters of the State of California, described in the said covenant. (Record, p. 7.)

Defendants demurred; and the demurrer was sustained—the court deeming the complaint defective in two respects, viz: 1st, that it did not show any reason for making the covenant; 2d, that the covenant set forth is in restraint of trade, imposes unreasonable restrictions, and is therefore void. Judgment was accordingly given in their favor. (Record, pp. 9, 12, 13.)

The cause was then by writ of error carried before the supreme court of the Territory, by which the judgment of the district court was affirmed in August, 1871. (Record, p. 14.) From the supreme court of

the Territory the cause was afterwards brought to this court on a writ of error.

It is claimed, in behalf of the plaintiff in error, that the court below erred in sustaining the defendants' demurrer to the plaintiff's complaint.

ARGUMENT.

This case turns upon the single question, whether the covenant entered into by the defendants in error with the plaintiff in error, whereby the former agreed "not to run or employ, or suffer to be run or employed, the said steamboat 'New World,' *upon any of the routes of travel, or the rivers, bays, or waters of the State of California*, or the Columbia river and its tributaries, for the period of ten years from the first day of May, 1867," &c., is valid.

The objection urged against the validity of the covenant is, that it is a contract in restraint of trade, and, as such, contrary to public policy.

The principle is admitted to be well established in our jurisprudence that a contract in *general* restraint of trade is against public policy and void. But, on the other hand, it is equally well established that there may be, upon a *good consideration*, and where *reasonable* ground exists for the restriction, a *partial* restraint of trade, and that an agreement for such purpose is sustainable. (See Lange *vs.* Werk, 2 Ohio St., 519; Guerand *vs.* Dandelet, 32 Md., 562; McClurg's Appeal, 58 Penn. St., 51.) Tried by this test, it is submitted that the covenant here is a valid one and should be upheld.

I.

The restraint imposed in this case was *partial* only.

This sufficiently appears by the terms of the covenant, and from the facts alleged in the complaint and admitted by the demurrer. At the time the contract was made, four of the defendants, viz., Wisnor, the two Crosbys, and Hale, were engaged in the business of navigation on the waters of Puget Sound in the Territory of Washington; the plaintiff in error was, at the same time, engaged in similar business on the Columbia river and its tributaries in Oregon and in said Territory; while a third party, the California Steam Navigation Company, was at the same time engaged "with numerous steam and other vessels" in similar business on the waters of the State of California. These facts are shown by the pleadings mentioned. Here, then, were three separate fields of the same business, each actually occupied by some one of the three parties referred to.

Now, it is obvious that any restraint which would prevent one of those parties, within a stated period, from extending or removing his business into either or both of the fields in which the others were engaged, even though these comprised the rest of the inland navigable waters on that coast, would be nothing more than a partial restriction, and that, too, both as to *time* and *space*; and, moreover, it is not perceived wherein the public could be prejudiced thereby to any appreciable degree.

See Wickens *vs.* Evans, 3 Y. & J., 318.

If this is true in a case where the restraint would affect the party in respect to the *business* of navigation or the carrying trade on the waters described, *a fortiori* is it true where the restraint affects the party simply as regards the *use or employment of a particular instrument or means* in that business—leaving him entirely free to carry it on with other like instruments or means.

The defendants in error were not restrained by their contract from engaging in the carrying trade on the waters of California or on the Columbia and its tributaries, but only from employing in that trade the steamboat purchased as aforesaid from the plaintiff in error. Thus the restriction was not only partial, but very limited in its scope and effect. It was confined to a particular agent or instrumentality, capable, perhaps, of being usefully employed in the said trade, but it did not otherwise interfere with the prosecution of the trade itself.

See the case of Dunlop *vs.* Gregory, 10 N. Y., 241, which is very similar to this. Also the following authorities:

Chappel *vs.* Brockway, 21 Wend., 157.
Pierce *vs.* Fuller, 8 Mass., 226.
Perkins *vs.* Lyman, 9 Mass., 522.
Palmer *vs.* Stebbens, 3 Pick., 188.
Leighton *vs.* Wales, 3 M. & W., 545.

II.

There was a *good consideration* for the covenant.

The consideration upon which the covenant was made, as shown by the recitals of the instrument containing it, was the transfer of the steamboat to the covenantors. In other words, the bargain was that the latter should pay $75,000 and enter into that covenant *for the boat.* Here there certainly was, in legal contemplation, a good consideration. All that the law requires, on this head, is that the consideration shall be a valuable, and not a mere colorable one. As to its *adequacy*, this the court will not inquire into; it being now settled that in this as in other contracts the parties must act on their own views in respect to the sufficiency of the consideration.

Hitchcock *vs.* Coker, 6 Ad. & E., 438.
Archer *vs.* Marsh, 6 Ad. & E., 966.
Pilkington *vs.* Scott, 15 M. & W., 657.
Guerand *vs.* Dandelet, 32 Md., 562.
McClurg's Appeal, 58 Penn. St., 51.

III.

There was fair and reasonable ground for the restriction in the covenant.

In Horner *vs.* Graves, 7 Bing. 743, Tindal, C. J., said: "We do not see how a better test can be applied to

the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a *fair protection to the interests of the party* in favor of whom it is given, and not so large as to interfere with the interests of the public." This rule was approved by Baron Parke, in Mallan *vs.* May, 13 M. & W., 511, 517. It exacts nothing more than that the restraint be not greater than is reasonably required for the protection of the party in dealing with some subject-matter of contract.

The *principle* upon which the rule rests is this: Every legal obligation is, in effect, a restriction upon the freedom of action or liberty of the party upon whom it is imposed, and it would be contrary to the interest of all to permit any one to restrain the liberty of another out of pure caprice and without any advantage or benefit resulting to himself therefrom.

Thus, in Pothier on Obligations, (vol. 1, Evans' ed., p. 71,) it is observed: "The party in whose favor the obligation is contracted ought to have *an appreciable interest* in the act being done. The reason is evident. An obligation being a legal tie, there cannot be any obligation if the person promising may violate his promise with impunity; and it is evident that he may do so when the other party has no appreciable interest in the performance or non-performance of it, for there cannot arise any damages to him for the non-performance, damages being nothing but the estimation of the interest which the creditor has in the performance of the obligation."

The facts admitted by the pleadings in the case show, that at the time the covenant was entered into by the defendant in error the plaintiff in error was bound by a similar covenant to the California company. It was agreed with this company, for a valuable consideration, that neither the plaintiff nor the successors or assigns of the plaintiff would run or employ the said steamer on the waters of the State of California, for a definite period, and in case of a breach of this agreement the plaintiff was to pay the company $75,000 in coin, as stipulated damages. The existence of this agreement, and the liability which would arise upon a breach thereof, indicate the motive for including the waters of the State of California in the covenant given to the plaintiff by the defendants on their purchase. It was simply to protect the plaintiff against the liability mentioned.

The interest the plaintiff had in keeping in good faith the agreement with the California company, and *in avoiding loss by a breach of that agreement through the act of the defendants*, furnish reasonable ground for the contract with the latter. The restriction which this contract laid upon the defendants in favor of the plaintiff was, under the circumstances, fair and proper, and not too large; and since the latter had an *appreciable interest* in the performance of the contract, the obligation imposed by it on the former was binding in law, and should be enforced.

G. H. WILLIAMS,
Attorney for Plaintiff in Error.

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BRIEF OF DEFENDANTS IN ERROR

B. F. DENNISON,
Attorney for Defendants in Error

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BRIEF OF DEFENDANTS IN ERROR.

The action is brought to recover $75,000, as "liquidated damages," for an alleged breach of a

covenant and bond, given by Winsor, Crosby *et al.*, to the Oregon Steam Navigation Company on the sale by the latter to the former, of the "New World," in February, 1867.

The covenant and bond prohibited the purchasers, their successors and assigns, from running the "New World," or using her machiney, in any of the waters of the State of Oregon or California for the period of the ten years from the first day of May, 1867.

The alleged breach of covenant and bond occurred in the waters of the State of California, in November, 1868, while the "New World" was owned by the vendees of Winsor, Crosby *et al.*

Neither at the time of sale, nor at any time, was the Oregon Steam Navigation Company engaged in navigating the waters of the State of California.

The pleadings consist of the complaint and demurrer.

The questions involved are properly raised by demurrer.

Ross vs. Sadgbeer, 21 Wend, 166.
Lange vs. Werk, 2 Ohio State R., 519.

I.

THE COMPLAINT DOES NOT CONTAIN THE NECESSARY AVERMENTS IN AN ACTION OF THIS KIND.

Mitchell vs. Reynolds, 1. P. Williams, 181.
Homer vs. Ashford, 3 Bing., 322.
Chappel vs. Brockway, 21 Wend. 157.,
Ross vs. Sadgbeer, 21 Wend.. 166.
Lange vs. Werk, 2 Ohio State R., 519.
Pierce vs. Fuller, 8 Mass. R., 223.
Palmer vs. Stebbins, 3 Pick. R., 188.

II.

Our main proposition is—

THAT THE COVENANT AND BOND, ON WHICH THIS ACTION IS BROUGHT, ARE IN RESTRAINT OF TRADE AND COMMERCE, AGAINST PUBLIC POLICY, AND VOID.

Contracts in restraint of trade are of two kinds:

1st. Those in *general* restraint of trade.

2d. Those in *partial* restraint of trade.

General restraints are all void.

Partial restraints *may* be good, or may not, according to circumstances.

The rules of law applicable to each may be found in—

Mitchell vs. Reynolds, 1 P. William, 181.
Homer vs. Ashford, 3 Bing., 328.

Haywood vs. Young, 2 Chitty's R., 407.
Stewart vs. Nicholson, 3 Bing., N. C., 113.
Gale vs. Reed, 8 East., 83.
Ward vs. Byrne, 5 M. & W., 548.
Green vs. Price, 13 M. & W., 695.
Mallan vs. May, 11 M. & W., 665.
Cheesman vs. Nainby, 2 Strange, 739.
Hitchcock vs. Coker, 6 Ad. & Ellis, 438.
Story on Contracts, Sec. 550.
Metcalf on Contracts, P. 282.

Keeler vs. Taylor, 53 Pa. State R., 468.
Ross vs. Sadgbeer, 21 Wend., 167.
Chappel vs. Brockway, 21 Wend., 156.
Dunlop vs. Gregory, 10 N. Y. R., 244.
Noble vs. Bates, 7 Cowen, 306.
Lange vs. Werk, 2 Ohio State R., 519.
Thomas vs. Miles, 2 Ohio State R., 274.
Grasselli vs. Lowden, 11 Ohio State R., (N. S.) 549.

Crawford vs. Wick, 18 Ohio State R., 190.
Brown vs. Marshall, 4 Green (N. J.) 537.
Beard vs. Dennis, 6 Ind. 200.
Taylor vs. Blanchard, 13 Allen, 370.
Wright vs. Ryder, 36 Cal., 342.
Hartford & New Haven R. R. Company

vs.

New York & New Haven R. R. Company, 3 Rob. (N. Y.) 411.

State vs. Hartford &c. R. R. Company, 29 Conn. R.. 538.

Alger vs. Thatcher, 19 Pick. 51.

In the cases of *patented* articles, and *secret* arts and trades, the general rules of law in regard to contracts in restraint of trade are not applied.

Morse-Twist-Drill & Machine Company, vs. Morse, 103 Mass., R. 73.

Vickery vs. Welch, 19 Pick., 523.
Hard vs. Seeley, 47 Barb., 428.
Billings vs. Ames. 32 Miss., 265.
Alcock vs. Giberton, 5 Duer, 76.
Kinsman vs. Parkhurst, 18 How., 289.
Stearns vs. Barrett, 1 Pick., 443.
Story on contracts, Sec. 553.
Bryson vs. Whitehead. (1 Eng. Ch., 74.)

The restriction imposed upon the "New World" and her owners is *general*, within the meaning of the law as laid down in all the adjudged cases, extending as it does to all the waters of two States and parts of one Territory.

Dunlop vs. Gregory, 6 Selden 241.
Nobles vs. Bates, 7 Cowen, 306.
Chappel vs. Brockway, 21 Wend., 157.
Lawrence vs. Kidder, 10 Barb., 641.
Taylor vs. Blanchard, 13 Allen, 370.
Wright vs. Ryder, 36 Cal. R., 469.

Homer vs. Ashford, 3 Bing., 469,
and other English cases cited.

In Perkins vs. Lyman, (9 Mass., 494,) the business agreed to be relinquished was carried on *out of the county*, and was "*very limited in its nature.*"

Stearns vs. Barrett, (1 Pick., 443,) was the case of a *patented* invention.

If the restriction is not *general*, it is *partial*, and the presumption of law is against its validity. Hence the burden is on the plaintiff in error to show that the restriction is *reasonable in extent*, and otherwise free from objection.

"Good reasons" must appear—such as a court can approve of—otherwise a demurror will be sustained.

Upon this point we refer again to—
Mitchell vs. Reynolds, 1 P. Williams.
Lange vs. Werk, 2 Ohio.
Ross vs. Sadgbeer, 21 Wend.
Pierce vs. Fuller, 8 Mass.
Palmer vs. Stebbens, 3 Pick.
Chappel vs. Brockway, 21 Wend.,
and other cases cited.

How far a restriction may extend, and what limits will be considered *reasonable* or *unreasonable*,

may be illustrated by examination of the following cases—showing different shades of opinion :

Homer vs. Graves, 7 Bing., 743.
Davis vs. Mason, 5 D. & E., 118.
Bunn vs. Grey, 4 East., 190.
Price vs. Green, 16 M. & W., 346.
Nobles vs. Bates. 7 Cowen, 306.
Gillman vs. Dwight, 13 Gray, 356.
Duffy vs. Shockey, 11 Ind., 70.
Whitney vs. Slayton, 40 Maine R., 224.
Palmer vs. Stebbens, 3 Pick., 188.
Pierce vs. Woodward, 6 Pick., 206.
Clark vs. Crosby, 37 V. & R., 188.
Pierce vs. Fuller, 8 Mass., 223.
Chappel vs. Brockway, 21 Wend., 157.
Lawrence vs. Kidder, 10 Barb., 653.
Wright vs. Ryder, 36 Cal., 359.

The restriction must be such only as was necessary to protect the party in the "*prosecution of his business.*"

Kellogg vs. Larkin, 3 Chand., (Wis.) 133.
Story on contracts, Sec. 553.

We therefore claim—

1st. That the covenant and bond impose a *general* restriction within the meaning of all the adjudged cases, and are therefore void, no matter upon what consideration made, or under what circumstances entered into.

2d. If the restriction be considered *partial* only, then, that the complaint does not contain the necessary averments, in an action of this kind, and the demurrer must be sustained.

B. F. DENNISON,
Attorney for Defendants in Error.

November, 1872.

Franklin Wolcott & Counsel

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ARGUMENT ON BEHALF OF DEFENDANTS IN ERROR.

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ARGUMENT FOR DEFENDANTS IN ERROR.

The only pleadings in the case are the amended complaint and the demurrer.

COMPLAINT.

The amended complaint and exhibits annexed disclose the following facts:

1st. In October, 1862, the Oregon Steam Navigation Company was, and still is, a corporation, organized under the laws of the State of Oregon, for the navigation of the Columbia river and its tributaries, in said State, and in the Territory of Washington, and the Pacific and other oceans, and have been engaged in said navigation ever since its said organization.

2d. In May, 1864, and for many years previous, and to the present time, the California Steam Navigation Company was a corporation, organized under the laws of the State of California, and were engaged in transporting passengers and freight, for hire, on the routes of travel on the rivers, bays, and waters of the State of California, and on the waters of the Pacific ocean.

3d. In May, 1864, the said California Steam Navigation Company, being the owner of the steamer "New World," sold her to the Oregon Steam Navigation Company for the sum of $75,000, "and "also for a covenant and agreement by said Oregon "Steam Navigation Company that the said steam-"boat shall not be run upon any of the routes of "travel on the rivers, bays, or waters of the State "of California for the period of ten years from the "first day of May, 1864," and exacted from the

latter a covenant "that they will not run or em-"ploy, or suffer to be run or employed, the said "steamboat "New World" *upon any of the routes of* "*travel* on the rivers, bays or waters of the State of "California, for the period of ten years from the "first day of May, 1864." * * * * "That the "machinery of the said steamboat "New World" "shall not be run or employed in running any steam-"boat, vessel or craft, upon any of the *routes of* "*travel, on the rivers, bays or waters of the State* "*of California*, for the period of ten years from the "first day of May, 1864," * * * * "That in "case of any breach of this covenant or agreement, the covenanters are to pay * * * the sum of "seventy-five thousand dollars in gold coin * * * as actual liquidated damages."

4th. In February, 1867, Henry Winsor, C. Crosby, Calvin H. Hale, and Nathaniel Crosby, Jr., were engaged in navigating the waters of Puget Sound and the Straits of Fuca, and being desirous of purchasing said steamer "New World," the Oregon Steam Navigation Company sold the same to them for the sum of $75,000, and "also for a cove-"nant and agreement by them, that said steamboat "shall not be run upon any routes of travel on the "rivers, bays or waters of the State of California, "or the Columbia river and its tributaries for the "period of ten years from the first day of May, "1867;" and exacted from them a covenant obligating "*themselves, their successors and assigns*,"

"that they will not run or employ, or suffer to be "run or employed, the said steamboat "New "World" upon any of the routes of travel on the "rivers, bays, or waters of the State of California, "or the Columbia river and its tributaries for the "period of ten years from the first day of May, 1867." And a like covenant was exacted "that the ma- "chinery of the said steamboat "New World" shall "not be run or employed in running any steamboat, "vessel or craft," on any of said routes of travel, or said waters, during said time.

A bond was also taken from the purchasers, with S. D. Howe and A. R. Elder, sureties, conditioned to pay the Oregon Steam Navigation Company the sum of $75,000, liquidated damages, in case of any breach of said covenant.

5th. Neither at the time of said purchase, nor at any time, were the Oregon Steam Navigation Company engaged in the navigation of any of said waters of said State of California.

6th. The said steamer "New World" having been sold by the said Henry Winsor and others, was taken by the purchasers to the State of California, and in November, A. D. 1868, was placed on the route from San Francisco, California, to Vallejo, California, the same being a route on the waters of the State of California, and from said date said steamer has been used on said route for the transportation, for hire, of passengers and freight. At said date of November, 1868, and to this date, said

California Steam Navigation Company were engaged by means of a large number of steam and other vessels in the transportation, for hire, of passengers and freight on the said routes of travel of said State of California. Because of the premises, the Oregon Steam Navigation Company charge that the Defendants in Error have not kept their said covenant, but have broken the same, and ask judgment for the sum of $75,000, the amount stipulated between the parties, as actual liquidated damages.

From the foregoing, it will be seen:

1st. That the *restriction as to time*, imposed by the California Steam Navigation Company on the Oregon Steam Navigation Company, was ten years from May 1, 1864, and would terminate *May* 1, 1874.

2d. That the *restriction as to time*, imposed by the Oregon Steam Navigation Company on the purchasers from them, was ten years from *May* 1, 1867, and would not terminate until *May* 1, 1877.

3d. That the alleged breach of covenant occurred *on the waters of the State of California*, by running the "New World" between San Francisco and Vallejo, *being waters on which the Oregon Steam Navigation Company had never been engaged in navigation.*

4th. Another fact should be noticed, namely: That Winsor, Crosby and others, at the time of the purchase of the "New World," were not competitors

of the Oregon Steam Navigation Company, and were not prosecuting any business in the waters of California or Oregon, which they were induced *to sell out*, for a valuable consideration, to the Oregon Steam Navigation Company, or which they agreed thereafter *to abandon or relinquish.*

This feature, which is found in nearly all of the cases where contracts in partial restraint of trade have been upheld, is entirely wanting in this case.

Nor had the Oregon Steam Navigation Company *any interest* in those waters to be protected or rights to be invaded. We insist that the covenant and bond entered into by the Oregon Steam Navigation Company with the California Steam Navigation Company, did not create such an interest in the Oregon Steam Navigation Company as would furnish a consideration, or even *a good reason*, for a restriction embracing the waters of the State of California.

"A man cannot, for money alone, where he has "no other interest in the matter, purchase a valid "contract in restraint of trade, however limited may "be the circle of its operation."

Chappel *vs.* Brockway, 21 Wind. 162.

One of the reported cases containing this important feature is that of Chappel *vs.* Brockway, 21 Wind. 157, the facts being that plaintiff and defendant *were running competing boats* on the Erie Canal, between Rochester and Buffalo. The defendant

sold his boats and other property connected with them, to plaintiff, and agreed not to run or be interested in any boats on the Erie Canal thereafter, &c. And the court, among other things, said—"the "restraint, as a general rule, may extend far enough "to afford a fair protection to *the purchaser of the "business which the seller agreed to relinquish.*"

So in most of the reported cases, the parties had been competitors in business, and one *had sold out* his business or property to the other, and the seller had agreed, for a valuable consideration, to *abandon* or *relinquish the business* for a time, or in a certain locality.

Among others are the cases of:

Pierce *vs.* Fuller, 8 Mass. 223.
Perkins *vs.* Lyman, 9 Mass. 522.
Palmer *vs.* Stebbins, 3 Pick. 188.

5th. That no *good reason* for exacting or entering into the covenant and agreement in question, is set forth in the amended complaint—at least, no such *good reason* as a court can sanction or approve.

6th. That the restriction is not limited to a *single individual only*. Not only Henry Winsor, Clanrick Crosby, Nathaniel Crosby, Jr., and Calvin H. Hale, but "*their successors and assigns*" are bound by the covenant and bond. The disability is made to adhere to the "New World" in the hands of all successive owners.

The language of the bond is—"that they will not

"run or employ, or *suffer to be run or employed*, the "said steamboat 'New World' "--not even in case of war, pestilence, famine, or other public calamity.

7th. That the restriction as to place extends very far, embracing all the navigable inland waters of two States and parts of one Territory, and all the bays, harbors and inlets on the Pacific Coast between the southern boundary of the State of California and the northern boundary of the State of Oregon. Nor is this the whole extent of the restriction. By the covenant and bond the "New World" is prohibited from making a trip from any port in the State of Oregon or California to a port in any other State or country, because necessarily in making such trip she must run upon prohibited waters. The extent of the interior routes of travel by water in these two States is immense.

8th. That the practical result of this restriction must obviously be, greatly to impair the value of the "New World" to her owners, and her usefulness to the public as an instrument of commerce.

9th. That the *consideration*, if any, of this covenant and bond was merely nominal—a recital inserted as a mere evasion of the law—the $75,000 being evidently the full value of the "New World."

DEMURRER.

The grounds of demurrer are :

1st. The amended complaint does not state facts sufficient to constitute a cause of action.

2d. The contract set out in the complaint is one in restraint of trade and against public policy, and therefore void.

3d. That the agreement, as set forth in the complaint, is in contravention of the laws of Congress regulating commerce and navigation, and is therefore illegal and void.

To be more explicit, we insist :

1st. That the amended complaint sets forth a contract in restraint of trade and commerce, and against public policy.

If the purchaser of a steamboat, of the value and capacity of the "New World," covenants with the seller, at the time of the purchase, that he will not run or employ her, or suffer her to be run or employed, for ten years upon any of the waters of a State, such covenant is in restraint of trade and commerce, and against public policy.

Wright *vs.* Ryder, 36 Cal. R. 342.

2d. That said complaint does not show any *good reasons* for exacting, or entering into, the covenant, agreement and bond ; nor does it contain the necessary averments to show the contract *reasonable*, so as to rebut the presumption of law against its validity.

Upon this point we state the rules of law to be as follows:

"The general presumption is against all contracts in "restraint of trade, and consequently it lies upon him who "seeks to enforce such an obligation, to show that it is "free from objection.

"It is not enough that there be *a consideration*, such as "would uphold a contract *in which the public have no inter-* "*est;* but that whatever may be the *pecuniary considera-* "*tion*, it must appear *in addition*, that there was some "*good reason* for entering into the contract."

Chappel *vs.* Brockway, 21 Wend. 157.

Again,

"A contract in restraint of trade is, in legal presumption, "void; and such presumption can be rebutted only by "showing that it was entered into for *good reasons*, and "the burden of showing the facts rendering the contract "valid rests upon the party seeking to enforce it."

"If those facts do not appear upon the face of the con- "tract, they may be averred in the declaration, and thus "the validity of the contract may be shown."

Ross *vs.* Sadgbeer, 21 Wend. 166.

So also, in the leading case of Mitchell *vs.* Reynolds, 1 P. Williams 181, the consideration which will uphold a contract in restraint of trade, according to Ch. J. Parker, is that which shows *it was reasonable for the parties to enter into it—that it was a proper and useful contract.* And he adds that a particular restraint is not good *without a just reason and consideration.*

So again,

"All contracts in general restraint of trade are opposed "to public policy and void; and those in partial restraint "are also illegal, except when founded upon a valuable "consideration, *and when good reasons appear for entering "into the contract.*

"Before such a contract can be enforced it must appear "from the pleadings:

"1st. That the restraint is partial.

"2d. Founded upon a valuable consideration.

"3d. That the contract is reasonable and not oppres- "sive.

"A declaration which does not contain the necessary "averments to show the contract *reasonable*, so as to rebut "the presumption of law against its validity, *is bad on "general demurrer.*"

Philip F. Lange *vs.* Michael Werk,
2 Ohio State Rep. 519.

Still further,

"In all restraints of trade, when nothing more appears, "the law presumes them bad; but if the circumstances "are set forth, that presumption may be excluded, and the "court is to judge of those circumstances and determine "accordingly.

"Wherever such contract *stat indifferenter*, and, for "aught appears, may be either good or bad, the law pre- "sumes it *prima facie* to be bad, and that for these "reasons:

"1st. In favor of trade and honest industry.

"2d. For that there plainly appears a mischief, but "that the benefit (if any) can only be presumed; and in "that case the presumptive benefit shall be overborne by "the apparent mischief.

"3d. For that the mischief is not only private, but "public."

1 P. Williams, 181.

To make such contracts valid :

"The *consideration and special circumstances inducing the "arrangement must be shown to the Court, and approved of "by it.*"

Pierce *vs.* Fuller, 8 Mass. R. 223.
Palmer *vs.* Stebbins, 3 Pick. R. 188.

In view of these authorities, and many others that might be cited to the same effect, is it a good and sufficient reason for exacting the covenant and bond in question—a reason which the Court can approve—a reason showing it to be "*a proper and useful contract for the parties to enter into*"—to say that the Oregon Steam Navigation Company was bound by a similar bond to the California Steam Navigation Company, not to run the "New World," or suffer her to be run, in any of the waters of the waters of the State of California ?

If this be so, it would be an easy matter for wealthy companies, or a combination of them, to extend their interests over all the waters of the United States, and thus evade the operation of principles of law founded in a wise and wholesome public policy, sanctioned by the experience of ages.

And, in the very case at bar, only one more sale of the "New World," with a restriction including

Puget Sound and the Straits of Fuca, was wanting to have excluded her from all American waters then on the Pacific Coast.

To this it is not a sufficient answer to say, that other steamers might have taken her place, because there might have been no others qualified to supply the public demands.

Besides, it might happen that these two corporations, which were occupying the waters of Oregon and California with their fleets of steamboats, would suddenly convey them all to purchasers on condition that they were not to be employed in navigating any of the waters of the Pacific Coast for a period of ten years, and thus produce a great public calamity.

Or, it might happen at San Francisco or Portland, as it did happen at St. Louis in 1849, that a whole fleet of steamboats would be destroyed by fire in a single night, and thus a great public inconvenience ensue.

So, many other exigences might arise, in which the services of a steamboat like the "New World" might be of incalculable benefit to the public weal, and the want of them, a public calamity. To assume that the supply will always be equal to the demand is unsafe reasoning, and contradicts all experience.

To-day peace and plenty may exist in a State, but to-morrow war and destitution may be at her gates.

To-day her harbors may be filled with the instruments of commerce, but to-morrow they may be utterly depleted.

Moreover, let it once be known that contracts like the one in question are to be upheld by Courts, and such contracts will multiply and be found to exist in all parts of the country where commerce is carried on; the immediate result of which will be, that we shall see large numbers of magnificent steamers like the "New World" rotting at our docks, or confined to limited circles of operation, if not driven out of American waters altogether.

And is there any other *good reason* set forth in the complaint, than the one just mentioned, showing the contract in this case to be "*a proper and useful one for the parties to enter into?*" Certainly not.

It is true the complaint sets forth, with great emphasis and circumlocution, that these two corporations were, and had been for many years, engaged in navigating the waters of Oregon and California "by means of a large number of steam and other vessels."

But what of it? Is *that* a good and sufficient reason, or *any* reason, why the purchasers of the "New World" should be bound not to allow her to turn a wheel in any of the waters of Oregon or California for a period of ten years?

Owing to grievances arising from well known causes, the principal questions involved in this case

have been, and still are, of great importance to the people of the Pacific Coast. The questions have been passed upon, not only by the District and Supreme Courts of Washington Territory, but also by the District and Supreme Courts of the State of California, in the case of George S. Wright *vs.* Jas. M. Ryder, reported in 36, Cal. R. 342.

All of these courts, with singular unanimity, have decided the questions adversely to the Plaintiff in Error ; and the history of the two cases shows the wisdom of the law in guarding the public weal against the mischiefs resulting from contracts in restraint of trade and commerce—contracts which expose the public to all the evils of monopoly, especially in the case of wealthy companies, and large corporations, who have the means, unless restrained by law, to exclude rivalry, enhance prices, monopolize business, and engross the markets.

"Against evils like these, wise laws protect individuals "and the public by declaring all such contracts void."

The case of Wright *vs.* Ryder was very fully argued—the Oregon Steam Navigation Company having intervened "by leave of Court," and made a powerful argument in favor of the validity of the covenant and agreement in question, *at the risk of fixing its liability to the California Steam Navigation Company on a similar covenant and agreement.*

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It was urged in the Court below, and may be again urged by the counsel for Plaintiff in Error in

this Court, that the principles of law applicable to contracts in restraint of trade, have no application to the covenant and bond in question in this case.

No person, it is said, is restrained by this covenant and bond from engaging in any business or occupation; that the owner of property may do with it as he pleases, and if he chooses to sell it, he is under no obligation to consult the public as to the terms of sale; that there is an obvious distinction, so far as the public is concerned, between a restraint affecting an individual in respect to his business, and one which merely affects him as to the use of particular property.

In other words, the argument is, that being the owner of the "New World," the Oregon Steam Navigation Company had the lawful right to withdraw her from commerce entirely; and, if they elected to do so, might have permitted her to rot at the dock, or otherwise destroyed her, in which event the public would have no right to complain though great public inconvenience might result.

From the fact that the company, as owner, had this absolute power of disposition, the inference is drawn that it might impose whatever restrictions it pleased on the future use of the "New World;" that the company might have imposed it as a condition of the sale that she should be taken to pieces and her machinery destroyed, and consequently that it was competent for the company to require

that the "New World" should not thereafter run in any particular trade or locality.

This argument is more plausible than real, for the same argument precisely would apply to a tradesman who agrees not to follow his trade at any time or place.

He may elect to abandon his calling altogether, however urgently the public may demand his services, or he may voluntarily disable himself from pursuing it, and thus deprive the public of his services entirely.

But it does not thence follow that he is bound by a *contract*, in which he stipulates that he will not pursue his avocation at any time or place.

The reason of the rule is that though he may intend and desire to abandon his trade or calling, as he has the right to do, the law, on grounds of public policy, will not allow him to bind himself not to resume his avocation if he shall afterwards elect to do so.

So, while the owner of a steamboat has the right to keep her idle, or to destroy her if he choose, however great the inconvenience may be to the public, it does not follow that he would be bound by a *contract* in which he stipulates never to employ her in the waters of a State. He might afterwards change his mind and desire to engage in commerce with her, in such State, and on grounds of public policy he would not be bound by his contract.

This reasoning was applied by the Court in the case of Wright *vs.* Ryder, and seems to be conclusive.

In that case the principles of law relating to contracts in restraint of trade were applied, and also in the following similar cases :

Dunlap *vs.* Gregory, 10 N. Y. R. 241.
Chappell *vs.* Brockway, 21 Wend. 157.
Stanton *vs.* Allen, 5 Denio. 434.
Cal. Nav. Co. *vs.* Wright, 6 Cal. R. 258.

In Holmes *vs.* Martin (10 Geo. R. 503) the plaintiff had sold to the defendant a town lot, imposing a restriction that the lot should not be used for keeping a tavern, and the restriction was held void.

I.

Our first and main proposition is :

That the Covenant, and Bond for its performance, on which this action is brought, are in restraint of trade and commerce, against public policy, and void.

Under the law as it now exists in England and the United States, contracts in restraint of trade are of two kinds :

1st. Those in *general*, or *total*, restraint of trade.

2d. Those in *partial*, or *limited*, restraint of trade.

The general principles and rules of law applicable to these two kinds of contracts, both in England and this country may be stated thus :

1st. All contracts in *general* restraint of trade are opposed to public policy and void, no matter upon what considerations founded, or under what circumstances they were entered into.

2d. Contracts in *partial* restraint of trade are also illegal, except when founded upon a valuable consideration, and when *good reasons* appear for entering into the contract, and the Courts are to judge of the sufficiency of the reasons.

3d. The general presumption is against all contracts in restraint of trade, and consequently it lies upon him who seeks to enforce such an obligation, to show that it is free from objection. The law starts with the presumption that the contract is void, and the burden of showing the facts rendering the contract valid rests on him seeking to enforce it.

4th. Before a contract in restraint of trade can be enforced it must appear in the pleadings or otherwise—

1st. That the restraint is *partial.*

2d. That it is founded upon a valuable consideration.

3d. That there were good and sufficient reasons for making it.

4th. That the contract is not injurious to the public, or oppressive to either party, and is a reasonable one.

5th. That it imposes no restraint upon one party which is not beneficial to the other.

6th. That the Court is the judge of the sufficiency of the special circumstances set forth as reasons why such contracts should be held valid.

5th. That the law relating to contracts in restraint of trade is not limited to handicraft trades, but extends to all branches of trade, and all kinds of business.

6th. A general restriction as *to place* will vitiate a contract, though *the time* of its duration is limited.

7th. Two classes of cases are exceptions to these rules, namely: Cases of *patented articles* and *secrete* arts and trades.

The authorities, English and American, in support of these principles are believed to be uniform.

Thus, in *Mitchell vs. Reynolds*, 1 P. Williams, 181, Ch. J. Parker, says:

"General restraints are all void, whether by bond, cov-
"enant, or promise, with or without consideration, and
"whether it be of the party's own trade or not."

"No man can contract not to use his trade at all;" but partial "restraints, extending to particular places or per-
"sons, if lawfully and fairly obtained, may be good; but
"they are not good without just reason and considera-
"tion," which "*appears to make it a proper and useful con-*
"*tract*"—and shows "*it was reasonable for the parties to*
"*enter into it.*"

And he adds:

"*In all restraints, where nothing more appears, the law* "*presumes them bad;* but if the circumstances are set "forth, the Court is to judge of those circumstances and "determine accordingly."

"The law," said Best C. J., in Homer *vs.* Ashford 3 "Bing. 328—will not permit any one to restrain a person "from doing what his own interest and the public wel- "fare demand that he should do. Any deed, therefore, "by which a person binds himself not to employ his "talents, his industry, or his *capital*, in any useful under- "taking in the kingdom would be void."—*id.* 469.

It cannot be *denied* that the money invested in the "New World," her machinery, etc., is capital.

"The general rule is, that all restraints of trade, if "nothing more appears, are bad."

Keeler *vs.* Taylor, 53 Pa. State, 468–9.

"But if the restraint be general, that is, not limited to "a *reasonable time and district*, it is *void* at law, and, of "course will not be enforced in Equity."—*id.*

The same principles were applied, under a variety of circumstances, in—

Homer *vs.* Grans, 7 Bing., 735.
Haywood *vs.* Young, 2 Chitty's R., 407.
Stewart *vs.* Nicholson, 3 Bing. N. C., 113.
Gale *vs.* Reed, 8 East., 83.
Ward *vs.* Byrne, 5 M. & W., 548.
Green *vs.* Price, 13 M. & W., 695.
Cheesman *vs.* Nainby, 2 Strange, 739.
Mallan *vs.* May. 11 M. & W. 665.
Hitchcock *vs.* Coker, 6 Ad. & Ellis, 438.

The American authorities are no less explicit.

In Story on Contracts, Sec. 550, the rule is thus stated:

"An agreement in *general* or *total* restraint of trade is "void, although it be founded on a legal and valuable "consideration."

"An agreement, therefore, not to carry on a certain "business anywhere is invalid," * * * "*whether it be for a limited or for an unlimited time.*"

"But an agreement in *partial* restraint of trade, restrain- "ing it within certain *reasonable* limits or times, or con- "fining it to particular persons, would, if founded upon a "good and valuable consideration, be valid."

In Metcalf on Contracts, p. 232, the same rules are stated, with this addition:

"And it is immaterial whether it be *the trade or pursuit* "*which the party usually follows, or any trade or pursuit,* "that he engages not to persue."

See also Parson on Contracts, Vol. 2, p. 747–8–9.

In Ross *vs.* Sadgbeer, 21 Wend. 167, Bronson, J. after citing Mitchell *vs.* Reynolds, says:

"In this I fully concur. The law starts with the pre- "sumption that the contract is void; and it is only by "showing that there was an adequate consideration or "good reasons for entering into it, that the presumption "can be destroyed. The rule is, not that a limited re- "straint is good, but that it *may* be good.

"It is valid when the restraint is *reasonable.*

"The facts which prove the restraint reasonable must "in some way be made to appear; and as the presump- "tion is against the party setting up the contract, it lies "on him to remove the difficulty."

In Chappell *vs.* Brockway, 21 Wend. 157, the same principles are even more forcibly stated, and fortified by a citation of numerous English and American cases.

The same principles are stated and enforced in—

Dunlop vs. Gregory, 10 N. Y. R. 244.

Noble vs. Bates, 7 Corwin, declaring "A cove-"nant in restraint of trade, generally, throughout "*the State*, is void."

Lange vs. Werk, 2 Ohio State R. 519.

Thomas vs. Adm. of Miles, 2 Ohio State R. 274.

Grasselli vs. Lowden, 11 Ohio State R. (N.S.) 349.

Alger vs. Thatcher, 19 Pick. 57.

Cal. Nav. Co. vs. Wright, 6 Cal. R. 258.

Wright vs. Ryder, 36 Cal. R. 342.

Taylor vs. Blanchard, 13 Allen, 370.

Beard vs. Dennis, 6 Ind. 200.

Crawford vs. Wick, 18 Ohio R. 190.

Brewer vs. Marshall, 4 Green (N. J.) 537.

Hartford and New Haven Railroad Company vs. New York and New Haven Railroad Company, 3 Rob. (N. Y.) 411.

In the case of Alger vs. Thatcher, the Court says:

"This doctrine (as to contracts in restraint of trade) "extends to all branches of trade and all kinds of busi-"ness."

"That the law under consideration has been adopted "and practiced upon in this country, is abundantly evi-"dent from cases cited."

"It is founded on great principles of public policy, and "carries out our constitutional prohibition of monopolies "and exclusive privileges."

And in Stanton vs. Allen, 5 Denio, p. 441, the Court says:

"The rule that contracts and agreements are void when "contrary to public policy, is one of the great preserva- "tive principles of a State."

It is, moreover, a wise and salutary law, suited to the genius of our institutions and the spirit of the age.

It stimulates enterprise, encourages rivalry and competition, and throws life and activity into all the avenues of trade and commerce. It is the guardian of the public weal and the safeguard of the citizen against extortion and imposition, protecting the weak without weakening the strong. It is a law founded in the same wise policy as that prohibiting contracts in restraint of marriage, wagers upon elections, and contracts with alien enemies. It is a law assuring equal rights in the pursuit of all branches of trade, and a law which ought to be upheld with a strong hand.

There are certain cases in which the foregoing rules, for special reasons, are not applied, namely; Cases of *patented* articles and *secret* arts and trades.

Thus, in Vickery vs. Welch, 19 Pich. 523, it is held that one may lawfully sell the right to carry

on a *secret* trade, and bind himself not to carry it on thereafter, or divulge the *secret*.

So, in Hard *vs.* Seeley, (47 Barb. 428,) and in Morse Twist Drill and Machine Company *vs.* Morse, 103 Mass. R. 73, the Court says:

"The principle has never been extended to a business "protected by a *patent*. Nor does it extend to a business " which is a *secret*, and not known to the public ; because " the public has no rights in the secret."

And cites English and American cases.

Billings *vs.* Ames, (32 Miss. 265) was the case of a *patented* process for putting up cemented hams.

Alcock *vs.* Giberton (5 Duer, 76) was the case of porcelain teeth protected by *patent*.

So, also, Kinsman *vs.* Parkhurst (18 How. 287) was the case of a contract between two joint owners of a patent, that only one of them should continue to manufacture the patented machines.

In these and other similar cases, such cases are allowed for the purpose of encouraging science and stimulating inventive genius.

Story on Contracts, Sec. 553.

Dran *vs.* Emerson (102 Mass. 480) was the case of a *secret* art in the ambrotype business.

Stearns *vs.* Barrett (1 Pick. 443) was the case of a *patented* machine.

Perhaps another class of cases may be regarded

as exceptions to these rules, namely: Cases where a party sells out his interest in, and agrees to relinquish, a business *carried on out of the country or State*, as in the case of Perkins *vs.* Lyman (9 Mass. 523).

In this last case, the business agreed to be relinquished was in making voyages from Boston to the Northwest coast, for the purpose of purchasing skins from the savages and taking them thence to China.

These exceptional cases, therefore, (in which agreements are usually upheld.) are not authorities of any weight in cases like the present.

II.

The restraint imposed upon the "New World" and her owners by the Covenant and Bond is general, within the meaning of the law as laid down in all the adjudged case.

In New York, it is held by the Court of Appeals that a restraint extending throughout *the State* is void, no matter upon what consideration made.

Dunlop *vs.* Gregory, 6 Selden, 241.

And the Supreme Court has held that a restraint which prohibits the pursuit of an occupation, or the carrying on of a business "*at any place in the State,*" is void.

21 Wend. 157.

So, "A covenant in restraint of trade, generally, throughout *a State* is void."

Nobles *vs.* Bates, 7 Cowen, 306.

The same court has held that a restraint extending thoughout all the territory west of Albany is void.

Lawrence *vs.* Kidder, 10 Barb. 641.

In Massachusetts, it is held that an agreement, for good consideration, not to carry on the business of making and selling shoe-cutters in the State is void.

Taylor *vs.* Blanchard, 13 Allen, 370.

"It is immaterial whether the agreement be for the "life of the party, or for a fixed and limited time. All such agreements are void."

Metcalf on Contracts, 232.
Story on Contracts, Sec. 551.

In California, also, it is held by the Supreme Court, all the judges concurring, that a covenant binding the owners of the "New World" not to run or suffer her to be run in any of the waters of the State, is "*unreasonable, and within the rules.*"

Wright *vs.* Ryer, 36 Cal. 359.

In England, according to all the cases, if the restraint is co-extensive with the kingdom it is void. The superficial area of that kingdom is less than the State of California.

In opposition to these authorities, the case of Perkins *vs.* Lyman (9 Mass. 494) is usually cited.

In this case, the defendant bound himself not to be interested in any voyage to the Northwest coast of America, or in any traffic with the natives of that coast, for seven years. The agreement was based on the sale of a vessel by defendant to plaintiffs, *peviously used in that trade;* the plaintiffs having been engaged in the same trade.

The business was that of buying skins of the savages for the China market. The trade was limited to about 9,000 skins annually, and was carried on *out of the country, or State of Massachusetts.*

The "*good reasons*" for entering into the agreement were fully set forth, and it was held valid. The Court saying:

"This is a branch of commerce *very limited* in its na-
"ture. A few ships only can be employed in it with any
"prospect of gain." "This is a trade but lately discov-
"ered, and it can be beneficial only to a small number of
"adventurers."

Another case usually cited in opposition to the above authorities is that of Stearns *vs.* Barrett (1 Pick. 443), in which there was an agreement not to use certain machines in any of the United States except *two* (Massachusetts and Rhode Island).

These machines were protected by *a patent*, and the case is one of those which are regarded as exceptions to the rules of law applicable to contracts in restraint of trade.

III.

If the restraint is not general it is partial, and the presumption of law is against its validity.

Hence, the burden is on the plaintiff in error, to show that it is founded upon a valuable consideration ; that there were good reasons for making it; that it is not injurious to the public, or oppressive to either party; that it is *reasonable* in exent; and that it imposes no restriction upon one party which is not beneficial to the other.

Failing to show these things, the complaint is bad on Demurrer.

Many of the cases in support of this proposition have already been referred to.

The two cases more directly in point, in which a demurrer was sustained, are—

Lange *vs.* Weak, 2 Ohio, 519.
Ross *vs.* Sadgbeer, 21 Wend, 166.

How far the restraint may extend, or, in other words, whether the prescribed limits are reasonable or not, depends upon the nature of the trade or business to which the contract relates.

This is the rule laid down in all the cases where the restraint is *partial*, and the question is as to how far it may extend.

In Homer *vs.* Graves, 7 Bing., an agreement by

a dentist not to practice within one hundred miles of York was held unreasonable and void.

In Davis *vs.* Mason, 5 D. & E., 118, an agreement not to exercise the business of surgeon, etc., within ten miles of Thetford, was held valid—Kenyon saying he did not see that the limits were unreasonable.

In Bunn *vs.* Guy, 4 East. 190, an agreement of an attorney not to practice within a circle of three hundred miles was upheld.

In Nobles *vs.* Bates, 7 Cowen, the restraint extended over a circle of forty miles diameter, and was held good.

So, of an agreement not to run a stage between Boston and Providence.

Pierce *vs.* Fuller, 8 Mass.

In Chappell *vs.* Brockway, the defendant had sold his business of running packet boats between Rochester and Buffalo; and the Court said:

"That cannot be an unreasonable restraint, which is "only co-extensive with *the business* which the defendant "*sold out* and *agreed to relinquish*, and the purchaser "expected to acquire."

In Gillman *vs.* Dwight, 13 Gray, 356, the restraint extended over a country village only (South Deerfield), and was held good.

In Duffey *vs.* Shockey (11 Ind. 70) the defendant had sold to plaintiff his marble and monument shop, and agreed not to establish a similar shop within certain limits, (which were very narrow,) the restraint was held not unreasonable for that kind of business.

In Palmer *vs.* Stibbens, 3 Pick, 188, the restraint extended only to the business of boating on the Connecticut River.

In Whitney *vs.* Slayton, 40 Maine Rep. 224, a bond, not to engage in casting iron within sixty miles of Calais, "*the area containing but few places of business*," was upheld.

In Pierce *vs.* Woodward, 6 Pick. 206, the agreement was not to set up the business of grocer within certain limits in the city of Boston. The defendant had sold out his business to the plaintiff, and afterwards opened another *on the same street, nearly opposite*, within the prescribed limits.

In Clark *vs.* Crosby (37 Vt. R. 188) where an agreement not to sell artificial teeth was held valid, the restriction extended only to a single town.

In Lawrence *vs.* Kidder, 10 Barb. 653, Selden J., after reasoning on the subject at some length, said:

"I am, therefore, of the opinion, independent of author-
"ity, that a contract prohibiting the pursuit of any trade
"or employment throughout the State of New York, should
"be regarded as a contract in total restraint of trade with-
"in the rule of the common law."

In Wright *vs.* Ryder, (36 Cal. R. 342) speaking of the covenants entered into by the Oregon Company with the California Company, the Supreme Court says:

"If the validity of these covenants was to be tested solely "by the question, whether the limitation of the area within "which they are to operate was reasonable or otherwise, "we should have no hesitation in pronouncing them un- "reasonable, and within the rule which holds such con- "tracts to be void as against public policy." "The cove- "nants include the entire area of the State, and are there- "fore in this respect without limitation, within the meaning "of the rule we have stated." (359).

In this opinion all the judges concurred.

Again: In Kellogg *vs.* Larkin, 3 Chand. (Wis.) 133, it is held, that

"The only reason which will support a contract in re- "straint of trade is, that the restriction was necessary or "useful to protect the party *in the prosecution of his busi- "ness.*"

So, "If the contract restrict the defendant from carry- "ing on a trade within a space greater than is necessary "to protect the plaintiff *in the enjoyment of his trade*, the "restriction would be considered unreasonabld, and could "not be enforced."

Story on Contracts, Sec. 553.

The case of the California Steam Navigation Company *vs.* Wright (6 Cal. R. 258), falls far short of upholding the validity of the covenant and bond we attack.

The agreement then passed upon by Ch. J. Murray and J. Terry, and non-concurred in by Justice Hydenfeldt, prohibited "the defendant from navigating by *steam*, all the navigable *streams* of the State: that he shall not run or suffer to run, any steamer in which he is interested, on the Sacramento, San Joaquin or Feather Rivers in the State of California, nor in the internal navigation of the Bay of San Francisco."

This was by no means so broad a restriction as that imposed upon the "New World."

In that case, Wright could run his boats by any other propelling power than steam on the rivers and bays mentioned, and could have run the same by *steam* from San Francisco to San Diego and way ports, or to Portland, and on the Columbia River and its tributaries.

The "New World" cannot be run, even as a barge or sailing craft. In the former case, the machinery of Wright's boats might have been removed therefrom and placed in other hulls, thus giving the public the benefit of competition; but the covenant in question prohibits the use of the machinery of the "New World."

Besides, in that case, Wright and Chenery, the assignor of the Californina Navigation Company, were running competing boats on certain waters of the State.

Chenery paid Wright $15,000 not to run his boats for three years, which Wright agreed to, and in case of any breach of this agreement by Wright, he would re-pay the $15,000 to Chenery or his assignees.

In Price *vs.* Green, 16 Meeson and W. 346, the defendant covenanted not to carry on the trade of a perfumer, etc., within the cities of London or Westminster, or *within the distance of six hundred miles* from the same respectively, the first part of the covenant was held valid, and the last void; because, by the latter, the restriction extended over the greater portion of the kingdom.

We are not going into the question of the *divisibility* of covenants of this kind; but it will be borne in mind that the alleged breach of covenant, complained of in the present case, occurred in the waters of the State of California, more than six hundred miles away from the field of operations, in which the Oregon Steam Navigation Company was engaged.

Besides, the restriction imposed by the Oregon Company on Winsor, Crosby, *et al.*, was to continue *until May*, 1877; while that imposed by the California Company on the Oregon Company was to continue only *until May*, 1874.

There are many other cases, English and American, bearing on the subject, but we do not con-

sider it necessary to refer to them. Those we have cited represent the different shades of opinion prevailing in England and in this country, and fully sustain the principles we have stated.

They are all of the same import, and we feel justified in saying that they all, with one united voice, condemn the covenant and bond in the case at bar.

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November, 1872.

Leander Holmes of Counsel